1980

City of South Ogden, A Utah Municipal Corporation v. Noel Okamoto and Susie S. Okamoto, His Wife : Brief of Respondents

Utah Supreme Court

GLEN E. FULLER; Attorney for Defendant- RespondentRICHARD L. STINE; Attorney for Plaintiff-Appellant

IN THE SUPREME COURT

OF THE STATE OF UTAH

CITY OF SOUTH OGDEN, a Utah Municipal Corporation, Plaintiff-Appellant, vs. NOEL OKAMOTO and SUSIE S. OKAMOTO, his wife, Defendants-Respondents	:	Case No. 16904

BRIEF OF RESPONDENTS

Appeal from the Judgment of the Second Judicial District Court of Weber County, State of Utah

Honorable John F. Wahlquist, Judge

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Plaintiff-Appellant,	:	Case No. 16904
vs.	:	
NOEL OKAMOTO and SUSIE S. OKAMOTO, his wife,	:	
Defendants-Respondents	:	

BRIEF OF RESPONDENTS

NATURE OF THE CASE

This appeal is concerned with a determination of whether certain admitted facts, together with allegations and admissions in the pleadings, can justify a ruling that the plaintiff in a condemnation action acquired possession of a property under the provisions of Section 78-34-9, Utah Code Annotated, 1953 (as amended 1967), so as to justify the running of statutory interest on the final award, even though no formal Order of Occupancy was secured by the plaintiff condemnor.

DISPOSITION IN LOWER COURT

The lower Court ruled that defendant condemnees were entitled to receive interest on the stipulated agreed value

of the property condemned and taken from and after the date of the filing of the Answer to plaintiff's Complaint.

RELIEF SOUGHT ON APPEAL

These defendants seek to have this Court affirm the Judgment, including interest, as awarded by the lower Court.

STATEMENT OF FACTS

Appellant has generally recited the skeletal facts setting forth the procedural sequence of the litigation; however, respondents do not agree with appellant's statement that it did not "... ever enter or take actual possession..." of the condemned properties, since the quoted phrase raises the mixed issue of fact and law which was before the lower Court and which is the subject of this appeal. Further, as this argument proceeds, it will be necessary to add a few additional supplemental facts in order to more clearly explain what events transpired between the time the Complaint was filed and when the matter was brought before the lower Court at the time of the Pre-Trial hearing.

ARGUMENT

POINT I

POSSESSION OF THE CONDEMNED PROPERTIES WAS SURRENDERED TO PLAINTIFF AT THE TIME THE ANSWER TO THE COMPLAINT WAS SERVED.

In condemnation actions under Utah law the value of real property taken for public use is determined as of the date of the Service of Summons:

> "78-34-11-- When right to damages deemed to have accrued-- For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the service of summons, and its actual value at that date shall be the measure of compensation for all property to be actually taken,..."

Although the foregoing statute fixes the valuation date, interest on the value of the property taken begins to run from the date the condemnor takes actual possession of the property or secures an order of occupancy, whichever is earlier, as provided in a companion portion of the Code:

> " 78-34-9-- Occupancy of premises pending action-- Deposit paid into court-- Procedure for payment of compensation.-- ... and the said judgment shall include, as part of the just compensation awarded, interest at the rate of 8% per annum on the amount finally awarded as the value of the property and damages, from the date of taking actual possession thereof by the plaintiff or order of occupancy, whichever is earlier, to the date of judgment;..."

In this case South Ogden City commenced condemnation proceedings to acquire vacant land for a new City building complex. Rather than serve the Complaint through normal channels, counsel for defendants accepted service of the Complaint (R. 6), and simultaneously served an Answer (R.5) on plaintiff's attorney. TheComplaint contained a special prayer for relief in the following terms:

> " Plaintiff further prays for an Order authorizing immediate occupancy of the described premises for the purpose of commencing construction." (R. 2)

In addition, the Complaint incorporated therein Exhibit "A", which was the Resolution of the City Council authorizing its attorney to proceed with the matter and to--

> "3. To obtain from said Court, an Order permitting the City to take immediate possession and use of said real property,..." (R.3)

On October 27, 1978, shortly after receiving the Complaint, defendants' attorney filed and served an Answer admitting the entire Complaint, but setting up the issue of the valuation of the property taken:

> " 1. Defendants admit paragraphs 1,2,3,4,5,6, 7, and 8.
>
> "2. Defendants deny that plaintiff has offered to them an amount of money which represents just compensation for the properties being condemned." (R. 5)

Further, the prayer for relief included in the Answer affirmatively sought relief for interest in addition to the fair market value of the lands being taken, in the following statement:

> "... together with interest thereon from the date of the acceptance of service of Summons on October 25, 1978, at the rate of 8% per annum, both before and after judgment, until paid,..." (R. 5)

Relying on plaintiff's representations in the pleadings that it required immediate occupancy of the lands to commence construction, defendants immediately abandoned and surrendered the property to the City and discontinued any further use of it (R. 25)*, a representation to the lower Court which was not disputed by plaintiff. In fact, the subject land is directly across the street from the present City offices (R. 26)*. However, the plans for the City complex were not finished and, as it developed, the delay was rather extensive (R. 26)*.

The matter was set for Pre-Trial on November 19, 1979, at which time the issue of whether plaintiff should pay interest on any award from the date of acceptance of service of Summons and Complaint arose. At the time it was agreed that the fair market value of the property would be determined as of October 27, 1978, when acceptance of Service became effective, and in fact

* These page references are found in the Record of South Ogden City v. Fujiki-- Case No. 16902.

the parties did subsequently agree as to the fair market value of the property taken.

At the Pre-Trial hearing plaintiff initially contended that it was necessary for an Order of Occupancy to issue before interest would run on any award (R.26-27)*, but subsequently attempted to convince the lower Court that it had not acquired actual possession of the property-- contending, as its argument developed in substance, that " actual" possession of the property should be synonymous with going on the property and taking " physical" possession. After argument on the matter the lower Court issued its ruling as follows:

OGDEN, UTAH NOVEMBER 19, 1979 11:30 A.M.

THE COURT: The Court will rule as follows: That in this Complaint there was an order-- that there was a Complaint filed alleging a need for and praying for immediate possession of the properties, and also alleging that they would be offered a reasonable sum. The Answer denies that they have been offered a reasonable sum, but admits all other pleadings.

The property apparently is truck farm property.

MR. STINE: Subdivision lots, if the Court please, that's

* These page references are found in the Record of South Ogden City v. Fujiki-- Case No. 16902.

THE COURT: Subdivision?

MR. FULLER: The highest and best use would be subdivision, but I think it had been used for crop farming.

THE COURT: The only practical use since the Summons was made would not be-- no one can very well use it for a subdivision.

MR. STINE: The highest and best use-- wasn't it zoned for a duplex at the time-- it's residential subdivision. They had truck farmed it, row cropped it from time to time.

THE COURT: The Court will deem that the state of the pleadings substantially destroys the value of the property, and that if the city goes through, they'll have to pay interest--

MR. STINE: From the date of--

THE COURT: -- from the date of the Summons-- from the date of the Answer when-- as soon as you knew that there wasn't any issue on it.

MR. STINE: From the date of the Answer?

THE COURT: That's right. ..."

THE COURT: Okay. It is the date of the Answer; as soon as they knew there was no issue and the possession could have lawfully been taken any time they wanted to from then on. The

value of the property as subdivision property had been destroyed for the landowner's purposes. Possession has been taken in the holding of the ground. That is the ruling of the Court." (See R. 13-14)

If defendants had retained possession and the use of the property after commencement of the action, there would be a logical argument that the constitutional mandate of paying just compensation would be satisfied, and several Utah cases so hold. However, under the facts of this case, where the pleadings emphatically recited the immediate need for occupancy of the premises, and where defendants immediately surrendered and abandoned the property to the City, it would indeed appear un reasonable to require the property owners to forebear both the use of their property and the alternative right to recover interest on its value simply because South Ogden City subsequently realized that there would be delays in getting its building plans prepared. Certainly, the Complaint and its attached Exhibit clearly indicated that the City was ready to go and that it wanted the property immediately. Under the circumstances, securing a formal Order of Occupancy was totally

unnecessary.

Plaintiff had possession of the subject property as of October 27,1978, within the meaning of Section 78-34-9.

Plaintiff cites several Utah cases in support of its position that interest is not allowable under the facts of this case, but each and every cited case is inapposite; rather, a careful reading of the cases supports the lower Court's ruling that interest should be paid on the award under the facts of this case. In Oregon Short Line R. Co. v. Jones, 29 Utah 147, 80 Pac. 732, an award of interest was denied where the property owner retained both possession and use of the condemned premises. But in that case, contrary to the facts before this Court, it was held that the condemnor-- " ... did not ask for and did not have possession of said lots,..." before trial; and " Nor was there any time when it could have taken possession and given a writ of assistance therefore until final judgment and Order of Condemnation." Further, the Court stated that" ... The condemnor is not required to make that compensation, until he does take, either actual or constructively."

Plaintiff also cites State v. Peek, 1 U. 2d 263, 265 P.2d 630 and State v. Bettilyon, Inc., 17 U. 2d 135, 405 P.2d 420, but neither case supports plaintiff's position. Peek recognizes

that a taking occurs "... when the possession of the property is actually surrendered, ..." and Bettilyon recognizes that interest accrues "... from the time of actual taking of possession..."

To paraphrase plaintiff's argument in its brief, plaintiff had actual possession of the subject property both in " fact" and in " reality". (Br. 7) In weighing the equities of this case, plaintiff ought to pay interest on the total award from the time the property was abandoned and surrendered to the City.

3 Nichols on Eminent Domain, Section 8.63 states that--

> " ... the right to interest from the time that payment ought to have been made until it is actually made follows as a matter of strict constitutional right."

Similarly, in the case of State of Oregon, by and through its D O T v. Glenn (1979), 602 P. 2d 253, that Court, interpreting a Constitutional provision similar to that of Article I,Section 22 of the Utah Constitution, stated:

> "Prior decisions of this Court have explained that the interest award is part of the ' just compensation' required by Article I,Section 18 of the Oregon Constitution."

POINT II

THE CONSTITUTIONAL MANDATE REQUIRING PAYMENT OF JUST COMPENSATION SHOULD NOT BE CIRCUMVENTED BY TECHNICAL PROCEDURAL MANEUVERS

During recent years we have experienced an explosive growth along the Wasatch Front in northern Utah, one of the results being reflected in a substantial amount of condemnation activity. Not all property owners have converted their lands from an established use, such as row-crop farming as exists in this case, so as to take immediate advantage of higher and better uses which have developed in different localities. Property owners have found that they can continue farming a tract of land, even though it is ripe for subdivision development as here, and that the farming activities will produce a given economic return and yet allow the owner to hold on to the property for a sufficient period of time as will reflect higher values over the years due to population pressures and the effect of inflation.

On the other hand, by retaining properties and not immediately converting them to the highest use to which they are adaptable at a given time, such open lands are fair game for condemning agencies seeking sites for highways, public buildings,

schools and the like. In fact, it is easy to see why condemnors might try to tie up such properties in advance of actual public needs so as to head off any development of such unimproved lands. In this case, the lands being taken had value because a subdivider would have purchased them on the date of the service of Summons for the purpose of constructing single family residences and duplexes in accordance with South Ogden City zoning. As Judge Wahlquist recognized, the filing of the Complaint effectively destroyed the highest and best use of the subject property.

As a result of the foregoing situation, there has developed an interesting and generally effective procedural tactic on the part of some condemnors whereby a property owner can effectively be denied the recovery of just compensation under the mandate of Article I, Section 22, of the Utah Constitution by maneuvering within the framework of Sections 78-34-11 and 78-34-9. Here is the way it works: The condemnor files and serves its Complaint, thereby establishing a valuation date for the property taken; however, to avoid the running of interest, it does not seek an order of immediate occupancy. Unless brought into Court on a motion seeking to dismiss the proceedings or force

actual taking of possession (which is no certain remedy for the landowner in any event), the condemnor will often do nothing until the condemnee forces the matter to trial. This strategy is being used more and more in an era of rapidly rising land prices, as we have been experiencing in the past few years.

It is understandable that a condemnor might move as rapidly as possible to file and serve its complaint so as to head off rising land prices, but to also attempt to avoid the payment of interest or to recognize ever increasing land values up to the time of actual trial often borders on unconscionable conduct. Even if, as here, the statutory rate of interest at 8% per annum is awarded to the property owner, this is far short of constitutional just compensation where one must accept market values at the date of the service of summons and complaint (plus 8% interest), when in fact the market conditions are moving along at an incremental rate of between 15% and 20% per annum, as was the situation in South Ogden during 1978 and 1979.

Appellant seeks both to freeze market values in this case as of October 27, 1978, and to deny either statutory interest at 8% per annum or the alternative greater per annum increase in the market value of the subject properties from and after that date. The only excuse it can make is that, when it alleged in its

Complaint and Resolution that it needed immediate occupancy to commence construction it really didn't mean what it claimed. Appellant's actions do not square with its argument to this Court.

In response to a somewhat similar situation in the case o Kimball v. Salt LakeCity, 32, U. 253, 90 Pac. 395, which involved a condemnation proceeding for damages and interest resulting from a change of the grade of a street in front of a residence (brought under Utah Constitution Article I,Sec. 22), our Court reflected:

> " The adherence to precedent is no doubt a commendable judicial virtue, but, if carried to extremes, may easily, like most virtues, border upon vice. The law as declared by the Courts should not be permitted to prevail against valid statutory enactments, and should in no event curtail or minimize constitutional provisions.

(Emphasis added)

Appellate courts should ever be mindful of applying existing statutory and case law to ever changing conditions, particularly when new and unusual factual developments permeating an economy must be considered and grappled with. This case presents a situation requiring a logical and practical application of the law and facts to the realities of modern times.

CONCLUSION

Plaintiff's abortive attempt to play hop scotch within the statutory framework cannot prevail against the superior and overriding mandate of the Utah Constitution requiring payment of just compensation to property owners who must unwillingly give up their lands through no fault of their own. Of all legal areas involving court action, the field of eminent domain should not be one where games are played. The lower Court accurately analyzed the situation for what it actually was, and ruled accordingly.

This matter was previously presented to this Court by plaintiff on a Motion For Summary Reversal of Judgment, pursuant to Rule 73 B, UtahRules of Civil Procedure, and was orally argued on April 7, 1980; and the Motion was denied on the same date. Plaintiff in pursuing this appeal has added little or nothing to what it presented in its Motion, and it would appear that this so-called Appeal is nothing more than a re-submission of the Motion which was denied. The procedure being followed by plaintiff, even if within the framework of the Utah Rules of Civil Procedure, certainly does not appear to comport with the spirit and intent of the Rules of Civil Procedure.

The Judgment of the lower Court awarding interest on the stipulated award from and after the date of the service of the Answer on October 27, 1978, should be affirmed.

Respectfully submitted,

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